No. 12023

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

HONOLULU PLANTATION COMPANY,
Appellee,

and

HONOLULU PLANTATION COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR HONOLULU PLANTATION COMPANY, APPELLEE

On Appeal from the United States District Court For the District of Hawaii

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OPINION BELOW

The opinion of the district court (R. 461-504) is reported at 72 F. Supp. 903.

JURISDICTION

This is an appeal and cross-appeal from a judgment entered November 5, 1947 (R. 504-507).

On February 3, 1948, within the time prescribed by law, the United States of America, petitioner in the Court below, duly filed a notice of appeal to this Court (R. p. 508) and on the same date the Honolulu Plantation Company duly filed a notice of cross-appeal to this Court (R. p. 509). Said appeal and said cross-appeal have been perfected to this Court.

The jurisdiction of this Court is invoked under the provisions of Section 128 of the Judicial Code, as amended, now 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

The statement of the case on pages 2 to 6 of the Government's opening brief is substantially correct, although the Appellee does take exception to certain of the remarks of the Appellant with reference to some of the testimony. The Court is referred to the statement of the case set forth in cross-appellants' opening brief at Pages 4 to 6 which more fully states the position of the Appellee.

QUESTION INVOLVED

It is submitted that the question presented by the Government in its opening brief is too narrow in its scope. The real question presented in the case is:

Whether, where real property condemned by the United States is a part of a larger tract which at the time of the takings was used as a sugar plantation, and after the takings, the plantation properties, including the mill, irrigation system, railroad, roads and the like were depreciated in value because of the severance of the real property taken from the properties operated as a unit by the plantation, an award for severance damages may be sustained where the plantation adduced evidence showing the market value of all of the real properties of the plantation before the takings and the market value of the same properties remaining after the takings.

SUMMARY OF ARGUMENT

1. Where a part of a tract of land (including the improvements thereon) is taken for public use, the just compensation to which the owner of an interest therein is entitled includes the damages to the remainder of the tract resulting from the taking, in addition to the value of the property taken. As a result of the takings in these proceedings, the physical properties of the Honolulu Plantation Company remaining after the takings were depreciated in value because of the severance of the real property taken from the properties operated as a unit by the Plantation. The difference between the market value of all of the real properties of the Company held before the takings and forming the integrated enterprise owned and conducted by the Company and the market value of the same property remaining after the takings is the amount the Company suffered in damages by reason of the severance.

ARGUMENT

I.

THE AWARD IS FOR DAMAGES TO THE REMAINING PROPERTIES OF THE PLANTATION.

It is well settled in the law of eminent domain that where land is taken by the sovereign the owner is entitled to be compensated not only for the value of the land taken but also for the loss in the value of the remainder of the tract. In the absence of a market price, the amount of compensation to which the owner is entitled is to be determined by taking the fair value of the whole plant at the date of the taking and also the fair value of the plant after the taking. The difference in these values represents the amount of compensation to be paid. *Stephenson Brick Co. v. U. S.*, 110 F. 2d 360, 1940; *Baetjer v. U. S.*, 143 F. 2d 391, 396, 1944; certiorari denied 323 U.S. 722; *Porrata v. U. S.*, 158 F. 2d 788, 789, 790, 1947.

The Government in its opening brief concedes the validity of this general rule but contends, however, that this well accepted principle has no application to the facts of the present case because the Honolulu Plantation Company by virtue of certain condemnation clauses in the leases had relinquished to the fee owners its interest in the value of the condemned land. It is said that the difference between the value of the whole before the taking and the value of the remainder thereafter which the Company claimed as severance damages actually represents the relinquished interest in the condemned land and not a diminution in the value of the remainder.

We shall attempt to demonstrate to the Court that the theory upon which the Government relies is founded upon a faulty premise and upon the assumption of certain facts which are not disclosed in the record. We will show to the Court that even though no claim was made for compensation for the property condemned but only for damages to the remainder that the award of the trial court should be sustained on the basis of the evidence adduced upon the trial of these consolidated proceedings.

It is a matter of record, of which the Court may take judicial notice, that the original consolidated thirteen proceedings included as defendants, numerous parties in addition to the Honolulu Plantation Company. The claims of the other defendants, including the lessors of the parcels taken, are not at issue in this proceeding. We are concerned here only with the compensation to which the Honolulu Plantation Company as lessee of the land taken is lawfully entitled.

While the Government apparently concedes the validity of the general rule with reference to severance damages, it apparently takes the position that the Honolulu Plantation Company failed to prove such damages upon the trial of this cause in the District Court. More specifically, the argu-

ment seems to be that although the Company's witnesses stated clearly and unequivocally that the Company suffered damages to the plantation properties remaining after the taking, their testimony is to be interpreted to mean that the amount of such damages represented the interest in the condemned land which the Company relinquished to the fee owners and not a diminution in the value of the remainder of the plantation. The Government attempts to justify this theory in part upon the assumption that in a claim for relief submitted to Congress, the Honolulu Plantation Company's claim was based on damages to each acre taken in the amount of $1,000 per acre. Apparently, the Government is attempting to rely on a statement of the Company purportedly made in a claim to Congress which has no relevancy to the issues in this case. More important, it refers to a Government exhibit introduced in the lower court which the Government did not see fit to designate as a part of the printed record on appeal.

The Government's position may be summarized in the following excerpt from the Government's brief. (Page 10)

> "... The company had invested in leased cane land at the rate of about $1,000 an acre. It had relinquished to the lessors its right in case of condemnation of such land to share in the compensation. As a result of this relinquishment it had lost what it invested. In short, the company had lost the money it had invested in the condemned lands. But since this loss resulted from the company's agreements with its lessors and not from the Government's condemnation of the land, the company had no claim against the Government...."

In view of these general considerations, we turn now to the evidence of damages introduced by the Honolulu Plantation Company at the trial below.

The testimony of Mr. George L. Schmutz (R. p. 669 et seq.) may be considered first. Mr. Schmutz valued all of

the properties of the Honolulu Plantation Company prior to the takings, excluding movable personal property and excluding growing crops at $4,200,000 (R. p. 686) and he valued the same property with the same exclusions after the takings involved in these proceedings as of June 21, 1944, at $3,113,000 (R. p. 687).

The following testimony of Mr. Schmutz appears at page 688 in the record.

> "Q. Would you explain how you arrived at that figure of a thousand dollars an acre?
>
> A. I took into consideration several matters. One of them was the evidence that I found in discussing the matter with people as regards to the common notion in the community regarding the investment in irrigated cane lands per acre, which was a thousand dollars an acre for plantations which did not have a refinery, whereas this particular property does. I also made a study indicating the amount of depreciation in the value of the property from 1939 on up until the present time, for the purpose of getting an over-all picture on shrinkage in the value occasioned by the taking of considerably more acres than are involved in this action, *for the purpose of arriving at an indication of the amount of depreciation on the average which was suffered by reason of the loss of each acre, on the average.* I also had occasion to make a study of a report prepared by a technician in this city of the damage caused by 580 acres of land taken in this particular plantation in some prior actions for the purpose of getting his views, his method of approach, and his conclusions. *And as a consequence of these studies and investigations and computations, I came to the conclusion that the average value is about a thousand dollars per acre; for each acre that was lost, shrunk the value of the property, the physical property, at the rate of about a thousand dollars per acre.*" (Italics supplied.)

At page 689 in the record:

"Q. As of the date of these takings the cane produced on the plantation would permit, that is, before the takings, as of the date but before the takings, permit what output of the mill?

A. As I recall, it was approximately 20,000 tons.

Q. And after the takings?

A. Approximately 15,000 tons.

Q. Would the fact as shown by such testimony and as shown by such evidence have anything to do with the value of the mill? If so, what?

A. In my opinion it would tend to depreciate the value of the mill because of the resulting over-capacity, and because of the further fact that there would be an increase in production costs, all of which would tend to put the mill in the position of being unable to earn a fair return upon its reasonable value."

At page 746 in the record:

"Q. So that the only thing that was affected was a lowering in your opinion of the value because of this over-capacity, is that right, with the cane lands available?

A. Over-capacity, plus the further fact that because of its oversize it could not be used as efficiently as a mill which was properly designed for the new capacity."

And at page 782 in the record:

"A. What I'm trying to say is that I made an estimate of what the value of this property was as I saw it on one date and then made another estimate of the value of the property as I saw it on another date, irrespective of all of these conditions which you speak of, irrespective of those I came to the conclusion that there was a certain shrinkage in the value which appeared to be approximately a thousand dollars an acre.

Mr. Stafford L. Austin, testifying as an officer of the Honolulu Plantation Company, gave as his opinion of value

before the taking the amount of $4,300,000 and after the taking gave as his opinion of value the amount of $3,300,000, or a difference of $1,000,000. At page 606 in the record appears the following testimony of Stafford L. Austin:

> "Q. You are using a thousand dollars an acre on each one of those, aren't you?
>
> A. Correct.
>
> Q. Why do you do that?
>
> A. Well, it's been the, more or less the rule of thumb from the standpoint of the plantations in my experience in the plantations in talking with others, from the standpoint of the Honolulu Plantation Company, with the refinery and such, that a thousand dollars an acre was an equitable figure to use for that purpose.
>
> Q. That's according to the books of the Honolulu Plantation Company and their method of bookkeeping, is that what you mean?
>
> A. No.
>
> Q. What do you mean, then?
>
> A. I mean from the standpoint of taking values and from talking to others, and the amount of capital required for a plantation the size of Honolulu Plantation Company, for putting in all the various equipment necessary to run a plantation that it would come to about that figure.
>
> Q. Well, is that valuation of the plant? Are you getting a capital value to it now in that answer?
>
> A. A capital value.
>
> Q. Capital assets?
>
> A. The initial investment, such as for ditches and pipe lines and mill and all the equipment necessary to run a plantation. . . ."

At page 571 in the record:

> "Q. What, if any, effect did that have on the value of the mill?
>
> A. Well, we could have — it reduced the mill value to one, to a mill the size of one that would take 15,000

tons of sugar. If you've got a 15,000-ton sugar mill that size, it would have been ample to take care of the crop."

At page 576 in the record:

"Q. Can you state, Mr. Austin, whether or not in peace times, normal times, it would be possible to successfully operate a plantation where it is a 15,000-ton plantation at Aiea?

A. At the location and with the lands left available, it would be — and the very heavy equipment that they have there for a larger output, it wouldn't be successful, and sooner or later the plantation would have had to be sold."

At page 609 in the record:

"Q. Likewise, these five other takings after Hickam Field, amounting to in the neighborhood of 700 acres, did those reduce the capital investment?

A. It shrunk the value of the plantation by that much.

Q. Affected capital investment that way, did it?

A. It wouldn't affect the capital investment,—

Q. Yes?

A. —but it would shrink the value of the whole plant, as a whole."

And at page 618 in the record:

"A. Well, the fact is this, if you have a great big piece of equipment and you built the whole plantation with the idea of operating in a certain manner, with a certain tonnage, when you don't get that tonnage by reason of a cutdown in the area, then the whole, your whole equipment decreases, there's a shrinkage in value of the equipment because you can't do what you put it up to do."

Mr. Charles Campbell Crozier, deputy tax commissioner of the Territory, who testified as an expert witness for the Company, valued the plantation prior to the taking as

$4,000,000 and after the taking at $3,000,000, making a difference of apparently $1,000,000.

A portion of Mr. Crozier's testimony (R. p. 873) is as follows:

> "Q. What is this thousand per acre rule that you mentioned?
>
> A. Well, it's one of the methods that can be developed as the rate per acre for a leasehold plantation insofar as the value of money in an enterprise, in its capital as a leasehold plantation, to operate and produce sugar. And that will vary with the size and many factors in it. But I should imagine that the 30, the 25,000 ton plantation, as a leasehold, would require for a thousand dollars per acre of capital to carry on its enterprise, starting with the virgin land and taking the land and weeding it, fencing it, and the ditches and everything else that goes with the enterprise. So that if you use that rule, that would represent a thousand acres at a thousand dollars and would be a million dollars diminishing."

It is clear from the evidence adduced at the trial that the $1,000-an-acre figure represented only the average overall investment per acre. It does not mean, as the Government seems to imply, that the Company's witnesses put an actual value of $1,000 on each and every acre of cane land. As a matter of fact, the testimony of the Company's witnesses indicates that while their opinions were based on a value of $1,000 per acre for each acre of cane land controlled by the plantation, they clearly did not value each acre at $1,000.

This is made even more apparent by the excerpt quoted by the Government (p. 9) from the report of the House Committee on Claims (R. p. 1550):

> "It showed that . . . plantations had an average investment of $1,023 per acre of arable sugar cane-producing lands, and that actual investment in capital of this claimant in 1939 before any expropriations of

> leased lands had occurred was $983 for every acre in production. After the takings the exhibit showed that the investment for the same purpose rose to $1,512 per acre."

It is to be noted that the report speaks of an *average investment* of $1,023 per acre, and of an *actual* investment in capital in 1939 of $983 for every acre in production. Moreover, the statement is made that after the takings, the investment "rose to $1,512." Obviously, if as the Government contends there were an actual investment of $1,000 per acre in each acre of cane land, the takings referred to in the claim would have reduced the investment in exact proportion to the land taken. To show the inconsistency of the Government's position, we refer briefly to the following statement also made in the House Committee report (R. p. 1549):

> "The evidence before this committee is that in excess of $5,000,000 were invested in this claimant's enterprise, all of which was indispensable to the raising and marketing of sugar cane. That this sum was largely invested in a mill, water and pumping system, and sundry other requirements such as housing for workers, hospital, and the like. *All of these were located on fee-owned lands of the claimant which were not devoted to raising sugar cane. . . .*" (Italics supplied)

It is believed that this excerpt from the very Committee Report upon which the Government relies in its argument reveals the untenability of the Government's theory. It is obvious that the mill, irrigation system, housing, and the like largely comprised the investment of the Company. For purposes of analysis and comparison, the Company in preparing the claim to Congress deemed it advisable to indicate the *average* investment per acre. This figure was obtained by dividing the capital investment (which investment was largely in the mill, irrigation system, housing,

and the like) by the number of acres of cane land controlled by the plantation. The result was the amount of $1,023 per acre. After the takings, when the same capital investment was divided by the reduced acreage, the average investment per acre rose to the equivalent of $1,512 per acre.

Actually, the contention made by the Government is an additional persuasive argument in favor of the plantation's position for it shows that the average investment in the plantation property, including the mill, camp housing, railroads, the irrigation system and the like, of approximately $1,000 per acre was required to operate the plantation prior to the takings and that as a result of the takings, *the investment in the plantation properties remained the same,* but since that amount was allocable to a reduced acreage, the average investment per acre was raised to $1,512 per acre.

The basic fallacy in the Government's argument is apparent when reference is made to other testimony of the Company's witnesses referred to above which shows conclusively that after the takings involved in these proceedings the Company's mill, irrigation system, railroad and other non-movable physical properties had an uneconomic over-capacity so that they could not be operated by the Company or anyone else as efficiently and as profitably as before the taking. The opinions of the Company's witnesses as to the value of the plantation's properties before and after the takings indicate that *the value of the property remaining after the taking* decreased in value at the rate of $1,000 an acre for each acre of cane land taken.

It is submitted to the Court that the Government is suggesting a construction of the so-called "thousand dollar an acre rule" which is wholly unwarranted by the evidence. As has been indicated above, neither the claim to Congress, nor the testimony of the Company's witnesses supports such an interpretation.

1. THE CONDEMNATION CLAUSES CONTAINED IN THE COMPANY'S LEASES DO NOT PRECLUDE A RECOVERY FOR SEVERANCE DAMAGES.

The Government in its answering brief makes the statement that by certain condemnation clauses contained in the leases, the Company relinquished to the fee owners its interest in the value of the condemned land. The Government seems to imply that such clauses operate as a termination of the lease and preclude any recovery by the lessee in the event of condemnation. In order to refute this argument, it is proposed to examine in some detail the condemnation clause which was contained in virtually the same form in all of the major leases of the Honolulu Plantation Company involved in this proceeding.

In Plantation's Exhibits 9-G (R. 1443), 9-H (R. 1374), 9-I (R. 1468) and 9-J (R. 1500), the following condemnation clause appears in substantially the following form:

> "(2) That in the event the demised premises or any part thereof shall be required, taken or condemned for any public use, then in every such case the estate and interest of the Lessee in the part of the premises taken shall at once cease and determine, and the Lessee shall not, by reason of such taking, be entitled to any claim either against the Lessors or others for compensation or indemnity for the taking of any land or water, or any buildings or other improvements as shall have been made prior to Jan. 1, 1936, and all compensation payable to or to be paid by reason thereof, shall be payable to and be the sole property of the Lessors, and the Lessee shall have no interest in or claim to such compensation or any part thereof whatsoever, provided, however, and it is hereby agreed that such compensation as shall represent the value of any growing crops shall be payable to and be the sole property of the Lessee; and such compensation as shall represent the value of any buildings or other improvements, made or constructed after Jan. 1, 1936, shall be divided

between the Lessors and the Lessee as their interests shall appear, dependent upon the then unexpired term of the lease; and it is further agreed that if such taking shall so affect the remaining premises held by the Lessee under this lease or so affect the operation of the Lessee's remaining lands and tenancies, or the business being conducted thereon as to cause substantial damage to the Lessee, then and in that event the Lessee shall have the right to present and pursue its claim for damages and be compensated therefor so long as such action or the payment of such damages shall not affect nor diminish the compensation payable to the Lessors as stipulated hereinabove. . . ."

This clause, it will be observed, provides that in the event of condemnation the estate and interest of the lessee shall cease and determine, but there is a further specific provision which provides as follows:

". . . and it is further agreed that if such taking shall so affect the remaining premises held by the Lessee under this lease or so affect the operation of the Lessee's remaining lands and tenancies, or the business being conducted thereon as to cause substantial damage to the Lessee, *then and in that event the Lessee shall have the right to present and pursue its claim for damages and be compensated therefor so long as such action or the payment of such damages shall not affect nor diminish the compensation payable to the Lessors as stipulated hereinabove. . . .*" (Italics supplied)

A somewhat similar condemnation clause was construed in the case of *United States v. 8286 Sq. Ft. of Space, etc.*, 61 F. Supp. 737, 738. In that case the pertinent qualifying provision read as follows:

". . . but nothing herein contained shall deprive Tenant of the right, if any, to receive from the requisitioning or condemning authority award for compensation or loss of or damage *to any of Tenant's tangible property or business,* provided the same is not in diminu-

tion of the award or compensation payable to Landlord; . . ." (Italics supplied)

In that case, the court expressly recognized that if the lessee were able to prove damages, he would not be precluded from such recovery by virtue of the condemnation clause.

In that case (p. 742) the Court remarked as follows:

". . . Reading the clause as a whole it is entirely clear that four things are definitely provided in the event of condemnation. They are (1) the lease expires; (2) the rights of the parties *inter sese* for the future thereupon terminate; (3) the tenant is not to be entitled to any apportionment of the award to be made by reason of the condemnation except that (4) *if the condemning authority damages the tenant's tangible property or business the latter shall not be deprived of the right, if any, to receive compensation for such loss or damage, provided the same is not in diminution of the award or compensation payable to the landlord.* (Italics supplied)

"True it is that *if* the tenant has a legal right to recover against the condemning authority for loss or damage to his tangible property or business (in which of course the landlord is not interested) then the tenant is not deprived of that right by the condemning clause. But this proviso is not applicable under the facts of this case. . . ."

In view of this additional proviso in the condemnation clause, it is submitted that the operative effect of the clause in question is such, insofar as the rights of the lessee are concerned, that if the lessee possesses a legal right to recover against the Government as a condemning authority for damages to the remaining premises held by the lessee under any of these leases or if the taking so affects the operation of the lessee's remaining lands and tenancy as to cause substantial damage to the lessee, then the lessee is not de-

prived of such a right under the condemnation clause. The damages claimed by the Company in these proceedings are measured by the depreciation in the value of the properties of its sugar growing and processing enterprise remaining after the taking and which were due to the taking. It is the contention of the Appellee that after the takings the plantation's mill, irrigation system and the plantation's property in general had an uneconomic over-capacity with respect to the cane lands to supply the enterprise, such that the plantation could not be operated by any one as efficiently as before the takings and that such over-capacity depreciated the value of the mill, the irrigation system and the other equipment and properties remaining after the takings.

It is the position of the Appellee that the qualifying provision of the condemnation clause does not affect the legal right of the lessee to recover for such damages, but on the contrary specifically recognizes that right in favor of the lessee. The Appellee concedes that it has no claim in this proceeding for compensation for the property condemned and physically taken because of the operation of the condemnation clauses referred to above. However, the Appellee contends that the qualifying provision of the condemnation clauses expressly permits the lessee to prove any severance damages it suffered by reason of the takings. As we shall hereinafter point out to the Court, the Company properly proved damages to its remaining lands on the trial of this cause. The trial court found that "the Company had proven its claim that its remaining property decreased in value at the rate of $1,000 an acre for each cane acre taken," (R. p. 491) and awarded damages upon the basis of $1,000 per acre for 440.175 acres, or a total of $440,175.00.

2. THE APPELLATE COURT WILL NOT CONSIDER A THEORY OF A LITIGANT BASED IN PART UPON AN EXHIBIT NOT INCLUDED IN THE RECORD ON APPEAL.

The Appellee wishes to point out a technical objection in connection with the reference by the Government to the claim which was submitted to Congress by the Honolulu Plantation Company. This claim was introduced in evidence by the Government and was admitted in evidence by the Court as Government Exhibit O but the Government failed to designate this exhibit as a part of the record on appeal.

It seems highly improper for a litigant in advancing a legal proposition on appeal to rely on an exhibit which is not a part of the record. The fact that the record does contain certain references to the Congressional claim, which are referred to in the Government's brief, should not affect the general rule that the Court will not consider any evidence dehors the record. *American Trust Co. v. Harris,* 88 F. 2d 541, 1937.

On appeal, the record alone controls with respect to the facts, and facts stated in the brief and not shown by the record may not be given effect. *Bono v. U. S.,* 113 F. 2d 724, 1940.

Accordingly, it is the position of the Honolulu Plantation Company that the Court should refuse to consider the argument of the Government to the effect that the award is for the land taken insofar as that argument is dependent upon any statements made in the Congressional claim.

II.

THE HONOLULU PLANTATION COMPANY IS LEGALLY ENTITLED TO THE AWARD OF $440,175 AS JUST COMPENSATION FOR SEVERANCE DAMAGES SUFFERED BY THE SAID COMPANY FOR THE TAKING OF ITS PROPERTY INTEREST IN 440.175 ACRES OF LAND.

For the convenience of the Court and for the purpose of preserving the continuity of Appellee's argument, it is believed desirable to repeat pages 24 to 36, inclusive, of cross-appellant's opening brief.

One of the principal issues before the District Court and the only issue involved in the present appeal and cross-appeal is whether or not the Honolulu Plantation Company is entitled to severance damages because of the taking of certain of the lands in these proceedings. No evidence was introduced by the Government relative to severance damages, the latter taking the position that the Honolulu Plantation Company was not entitled to severance damages as a matter of law. Accordingly, under well established rules of law, the Appellate Court must regard the findings of the trial court with relation to severance damages if adequately supported by the evidence, as conclusive and binding.

In order to assist the Court to the fullest extent in resolving the question of severance damages, it is believed advisable to first present the law applicable to that phase of the case and then to discuss the evidence. The law clearly allows the severance damages in question if they are proved, and the evidence adduced clearly shows that the Company was damaged.

It is clear that the property taken was mainly leasehold property and to a great extent the property remaining was leasehold property, though it should be pointed out that the sugar mill and the major part of the irrigation system and camps for employees which were located on fee lands owned by the Company suffered the greatest severance

damages. The fact that the property taken was leasehold rather than fee has, of course, no bearing on the rights of the Honolulu Plantation Company insofar as severance damages are concerned.

> "The critical terms are 'property,' 'taken' and 'just compensation.' It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years,' as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess."[1]

The above excerpt from the General Motors case indicates that the Court is here concerned with the plantation's "relation to the physical thing, as the right to possess, use and dispose of it," that is, the plantation's interest "in the thing itself" and that is the "interest known as an 'estate or tenancy for years'."

The basic rule with respect to severance damages is well stated by the Circuit Court of Appeals, Third Circuit, in the Sharpe case[2] in the following language:

---

[1] United States v. General Motors Corporation, 323 U.S. 373, 89 L. Ed. 311 (1945).

[2] Sharpe v. United States, 112 F. 893, 896 (1902).

". . . It is not denied that in rendering the 'just compensation' secured by the constitution of the United States to the citizen whose property is taken for public uses it is right and proper to include the damages in the shape of deterioration in value which will result to the residue of the tract from the occupation of the part so taken. In applying this rule, however, regard is had to the integrity of the tract as a unitary holding by the owner. The holding from which a part is taken for public uses must be of such a character as that its integrity as an individual tract shall have been destroyed by the taking. Depreciation in the value of the residue of such a tract may properly be considered as allowable damages in adjusting the compensation to be given to the owner for the land taken. It is often difficult, when part of a tract is taken, to determine what is a distinct and independent tract; but the character of the holding, and the distinction between a residue of a tract whose integrity is destroyed by the taking and what are merely other parcels or holdings of the same owner, must be kept in mind in the practical application of the requirement to render just compensation for property taken for public uses. How it is applied must largely depend upon the facts of the particular case and the sound discretion of the court."

The evidence, as we shall hereafter point out to the Court, clearly shows that the properties remaining after the takings (excluding movable personal property) suffered a loss in value by reason of the takings. If so, how may such loss of value be proven?

". . . 'Upon considering the record and the argument we find that the land taken is a part of a larger tract which at the time of the taking was used as a unit for a brick manufacturing plant and that the severance of the part taken did destroy the usefulness and value of the plant, so that what remained had the value only of disorganized land and buildings, and the machinery comprised in the plant had only the value of such second-hand property. The owner is entitled to be compensated not only for the separate value of the

land taken, but also for the loss in value of the remainder of the tract in the use that was made of it at the time of the taking.

'There being no established market price, the fair value at the date of the taking of the whole plant, excluding personal property, ought to be ascertained, looking upon it as a plant organized for a business shown to be generally successful and having a good prospect; and also the fair value for sale of what was left afterward. The difference in the values is the just compensation to be paid. That the plant was making money may be considered in fixing its value for sale, but the business is not to be valued as such, nor is any loss of future profits to be compensated. What the plant originally cost, what Stephenson Brick Company paid for it at judicial sale, it not having been a sheriff's sale, and what it would cost to reproduce the plant less a fair depreciation, may all be considered, but neither is to be taken as a fixed standard. The members of this court are not agreed on the value of all the items involved in the plant or in what is left of it, and we do not attempt to fix them separately. We do agree that the total compensation fixed by the three district judges is fair; and we find as our judgment of the value of the property condemned and as the just compensation due to be paid for the taking as of the date thereof, to-wit October 28, 1936, the sum of $97,500'." (Italics supplied)

Stephenson Brick Co. v. U. S. et al.
CCA 5th Circuit
110 Fed. 2nd 360, 361.
Decided March 15, 1940.

In *Baetjer v. United States,* 143 F. 2d 391, the Court says:

"With these general considerations in mind we turn to the evidence on damages introduced by the appellants at the trial below, but stricken at the end of their evidence in chief. This evidence was to the effect that in the past the appellants had raised sugar cane on the lands on Vieques which the government has taken; that

they had transported this cane to their mills on the main island of Puerto Rico for processing into sugar; and that, there being no other lands economically available upon which they could raise cane to keep their mills running at full capacity, they had suffered a loss to the extent of $270,000 'in value of excess equipment.' The meaning of the phrase just quoted is not altogether clear. *If it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by the appellants as efficiently and therefore as profitably as before the taking, then the stricken evidence shows only a loss to business which resulted as an unintended incident of the taking and so a loss not compensable under the doctrine of Mitchell v. United States, supra. On the other hand, if it means, and there is other evidence tending to show that this is what the witness who used the phrase meant by it, that the over-capacity of the mills with respect to cane lands available to supply them has depreciated their value on the market to the extent of $270,000, then the evidence would tend to show a compensable loss. In short the stricken evidence would indicate a compensable loss only if it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by anyone as efficiently and therefore as profitable as before the taking, this being a matter which a hypothetical willing buyer would consider in determining what he would pay for the property.* The case must be remanded for the court below to consider the appellants' evidence, and the evidence which the government says it can introduce to contradict it, in order to determine whether or not the appellants have suffered a compensable loss, and, if they have, its extent." (Italics supplied)

"It is well settled that, where part of a tract of land is taken for the public use, the just compensation to which the owner is entitled by the constitution includes the damages to the remainder of the tract re-

sulting from the taking as well as the value of the land taken. In other words, the 'just compensation' guaranteed by the constitution implies not merely the value of so much land separately from its connection with the whole tract, but the injury or loss to the whole estate caused by the taking from it the part which is so appropriated."

Nichols on Eminent Domain, Vol. 2
Second Ed. Par. 236, P. 721.

In the case of *Illinois Railway Company v. Humiston,* 208 Ill. 100 (69 N.E. 880), it appeared that a railroad condemned a strip of land for a right of way through a farm. There were buildings on a part of the farm, but the opinion indicates that the strip taken was vacant land. The lower court instructed the jury to value the strip "as a part of the whole farm" and excluded evidence offered by the taker concerning the value of the farm without improvements. The taker on appeal alleged that the exclusion of the evidence was error, on the ground that the value of the part was merely its value as "a part of the farm without improvements."

The upper court in affirming the lower court said:

"Where the vacant land embraced in the farm was necessarily used and occupied in conjunction with the improvements thereon, and, by reason of so being used and occupied, had a value as an entirety over and above the value of the bare land, the owner of the land would have the right to the value of the part, sought to be taken, as used and occupied in connection with the whole farm. In other words, the strip of land sought to be taken for a right of way has a special value to the owner in connection with the whole of the farm with the improvements upon it, which is greater than the mere value of the bare land without the improvements."

The case of *Lineburg v. Sandven* (N.D.) 21 N.W. 2d 808 is very much in point. This was an eminent domain proceeding arising out of the condemnation of lands for use as a public highway. The controversy here resulted from the taking of 21.88 acres of a farm containing 286.57 acres of land.

The District Court found the compensation to which the owner of the land was entitled was as follows:

Value of the 21.88 acres taken	$ 590.76
Value of the fence	187.50
Damages to the remaining farm as a unit	2443.59
Total Compensation	$3221.85

On appeal, the upper court sustained the findings made by the lower court except for the correction of an error made in the computation of the damages.

The principle stated by the lower court and accepted by the Supreme Court of North Dakota is well stated as follows:

> "The compensation to which appellant is entitled is the difference between the actual market value of appellant's property considered as a whole at the date of the trial before the severance of the property condemned and the actual market value of the remainder of the property after the appropriation of that part condemned."

In answer to the contention of the appellant's counsel that in arriving at the value of the farm before the taking, only the value of the land should have been considered and that no consideration should have been given to the buildings thereon, the Court said that this contention could not be sustained and quoted as follows from Lewis on eminent domain:

> "Ordinarily buildings are part of the land and when land is taken for public use the buildings and structures thereon are taken with it and the whole must be paid for."

The Court said further:

> "The farm was established and had been maintained and operated as a single unit. The buildings are undeniably a part of the realty. The owner of the farm is entitled to be paid the value of the parcel of property which is taken and he is entitled to be paid the damages to the remainder of the farm that was not taken which result from the taking of the parcel and the construction thereon of the proposed highway. The parcel so remaining consists not only of the land but of the buildings thereon which are a part of the realty."

Certainly in valuing the property of any enterprise the question of whether or not the combined properties produce a fair return on the capital invested is important. In other words, properties of a successful going concern when considered as a whole are almost certain to have a greater value than the same properties of a concern which has been unsuccessful and must be liquidated.

A prospective purchaser considering the purchase of properties like those of the Honolulu Plantation Company would look into the history of the concern and the use made of its properties. He would consider whether the enterprise was successful or not as well as the future prospects of the enterprise.

As stated in the Stephenson Brick Company case, supra,

> "There being no established market price, the fair value at the date of taking of the whole plant, excluding personal property, ought to be ascertained, looking upon it as a plant organized for a business *shown to be generally successful and having a good prospect;* and also the fair value for sale of what was left afterward." (Italics supplied)
>
> (110 Fed. 2nd 360, 361)

The evidence adduced by the Honolulu Plantation Company, on the trial of these consolidated cases, shows beyond

any reasonable doubt that the Company sustained a compensable loss and is entitled to severance damages as a result of the takings.

It is the contention of cross-appellant herein that after the takings, the Plantation's mill, irrigation system and the plantation equipment in general had an uneconomic over-capacity with respect to the cane lands available to supply the enterprise, such that the Plantation could not be operated by anyone as efficiently as before the takings and that such over-capacity depreciated the value of the mill, the irrigation system and the other equipment and properties remaining after the takings. The market value of all of the real properties of the Company held before the takings and forming the integrated enterprise owned and conducted by said Company was far higher than the market value or the fair value of the real property of said integrated unit remaining after the takings. The difference between those values is the amount the Company suffered in damages by reason of the severance.

It is submitted that the testimony given by several witnesses shows that an uneconomic over-capacity would depreciate the value of the remaining plantation properties as a unitary whole.

The testimony in this regard given by Mr. George L. Schmutz (R. p. 669 et seq.) may be considered first. The outstanding qualifications of Mr. Schmutz, from the standpoint of both training and experience, as an engineer, real estate broker, appraiser and as author and lecturer on appraisal work, considered together with his intimate knowledge of the properties taken in these proceedings, suggest that his opinions of value are entitled to great weight.

Mr. Schmutz valued all of the properties of the Honolulu Plantation Company prior to the takings, excluding

movable personal properties and excluding growing crops, at $4,200,000 (R. p. 686) and he valued the same properties with the same exclusions after the takings involved in these proceedings as of June 21, 1944, at $3,113,000 (R. p. 687).

Mr. Schmutz said specifically that in his computations he did not ascribe any value to profits or good will of a going concern. Mr. Schmutz indicated that his opinion of value computed before and after the takings was based on a unit property value of $1,000 per acre for irrigated cane land of a leasehold plantation (R. p. 687) and that he considered the total irrigated cane land area controlled by the Honolulu Plantation Company before the takings at 4,283 acres and that after the takings involved in these proceedings he considered the irrigated cane land controlled by the company at 3,196 acres (R. p. 687).

The witness testified that in arriving at a unit property value of $1,000 per acre he considered several matters. Among other factors, he said that in discussing the matter of value with people in the community regarding the investment in irrigated cane lands per acre, he found that the common opinion in the community was that leasehold plantations without a refinery required the investment of about $1,000 per acre in irrigated cane lands and the properties serving them (R. p. 688). The witness testified further that he had made a study showing the amount of depreciation and the value of the property from 1939 to the present for the purpose of determining the shrinkage in value occasioned by the taking of considerably more acres than are involved in the present proceedings to get some indication of the amount of depreciation on the average suffered by the loss of each acre (R. p. 688). Mr. Schmutz indicated also that he had made a study of a report prepared by a qualified technician in Honolulu concerning the damage caused by prior takings for the purpose of understanding his views, his method of approach and his conclusion. The

witness said that as a result of these studies and investigations, he arrived at a conclusion that the value of the physical property depreciated at the rate of about $1,000 per acre for each acre that was lost by virtue of the takings (R. p. 688).

Mr. Schmutz testified further that on the basis of the published annual reports of the company, the output of the mill was approximately 20,000 tons prior to the takings and about 15,000 tons after the takings (R. p. 689). It was his opinion that the decrease in the output of the mill would depreciate the value of the mill property not only because of the resulting over-capacity but also because of the further fact there would be an increase in production cost so that the mill could not be operated as efficiently and, therefore, as profitably as before the taking (R. p. 689).

The witness indicated that in arriving at his opinion of value he considered the fact that there was no land available for replacement of cane growing areas lost to the Government in these proceedings. He said that if there had been land available for replacement, the damage would have been less (R. p. 690). He testified that he also considered the fact that in 1936 the Company renewed or extended most of its major leases to the year 1965 (R. p. 678).

It was further pointed out that if there had been a free market for raw sugar and if the same could be purchased in the market in the future to take the place of plantation grown cane, the damage would have been less (R. p. 691).

Mr. Charles Campbell Crozier, Deputy Tax Commissioner of the Territory, testified as an expert witness for the Company (R. p. 835 et seq.).

Mr. Crozier indicated that in his capacity as a tax official and as an appraiser for the Government in a number of its takings, he had studied the Honolulu Plantation Company to a considerable extent (R. p. 852).

Mr. Crozier was asked to assume that on June 21, 1944, the Honolulu Plantation Company had approximately 4400 acres of cane land and that on that date 1,087.590 acres of cane land were taken from it, and to express his opinion as to the fair value of all of the properties of the plantation before and after the takings, excluding movable personalty and growing crops, taking into consideration his knowledge of the plantation, its holdings and the manner in which it was held (R. p. 870). The witness said that in his opinion there would be a diminishing value before and after the takings of approximately 20% or about a million dollars (R. p. 871).

The witness based his opinion of value on the theory that a plantation of 4400 acres was an enterprise of certain characteristics and that as the lands comprising the 1,087 acres were taken, there was a diminishing value. The witness said that as of June 21, 1944, a plantation of 4400 acres would possess a certain value, which the witness set at about $4,000,000. He testified that as of June 22, the day after the takings, by use of the so-called "thousand-dollars-an-acre rule," the value of the plantation would be about $3,000,000 (R. p. 873).

Witness explained the "thousand-dollars-an-acre rule" as one of the methods developed to estimate the capital or investment required for a 25 or 30 thousand ton leasehold plantation to operate and produce sugar (R. p. 873).

The testimony of Mr. S. L. Austin (R. p. 526 et seq.) and Mr. Spalding (R. p. 1040 et seq.), testifying as officers of the Honolulu Plantation Company, substantiates to a very large degree the testimony given by Mr. Schmutz and Mr. Crozier.

Mr. S. L. Austin's opinion of the value of the plantation, excluding movable personalty and growing crops before the takings involved in these proceedings, was $4,300,000 and

his opinion of the value of the plantation excluding the same items after the takings was $3,300,000 (R. p. 582, 583).

Mr. Schmutz, Mr. S. L. Austin and Mr. Crozier all testified that prior to the takings, the output of the mill was in excess of 20,000 tons and that the output of the mill after the takings was and could only be about 15,000 tons. All three witnesses expressed the opinion that the decrease in the output of the mill would depreciate the value of the mill property because of the resulting uneconomic over-capacity.

All three of the witnesses testified that in arriving at their opinions on value they considered the fact that there was no suitable land available for the replacement of cane growing area lost to the Government. All three of the witnesses testified that in their judgment the value of the remaining physical property depreciated at the rate of about $1,000 per acre for each acre of cane land which was lost as a result of the takings. All three of the witnesses testified that they did not ascribe any value to potential profits or the good will of a going concern.

It is respectfully submitted that the factors considered by the Company's witnesses were properly considered and that the testimony shows conclusively that after the takings involved in these proceedings the Company's mill, irrigation system and other nonmovable physical properties had an uneconomic over-capacity so that they could not be operated by the Company or by anyone else as efficiently and as profitably as before the taking.

Witnesses for the Company considered and they had a right to consider that the plantation was organized to conduct a business which had been generally successful and which possessed a good prospect. The factors considered by the witnesses in arriving at the value of the plantation before and after the takings, such as the dividends record of

the Company, the renewal or extension in 1936 of most of its major leases, the amount of money spent by the Company in capital improvements and betterments, the book value of the Company, the earnings of the property during the years prior to the takings were proper elements to be considered. It is admitted that the witnesses for the Company did not attempt to fix separately the value of all or any of the items considered in arriving at their opinions. However, they did reach substantial agreement on the difference in value of the plantation before and after the takings. Mr. Schmutz' opinion of the value before the taking was $4,400,000 and his opinion of value after the taking was $3,113,000 or a difference of $1,287,000 (R. p. 686, 687). Mr. Austin's opinion of value before the taking was $4,300,000 and his opinion of value after the taking was $3,300,000 or a difference of $1,000,000 (R. p. 582, 583). Mr. Crozier's opinions were substantially the same as Mr. Austin's.

The opinions of the Company's witnesses as to the value of the plantation's properties before and after the takings indicate that the value of the property remaining after the takings decreased in value at the rate of $1,000 an acre for each acre of cane land taken.

The attention of the Court is directed to a letter dated July 20, 1945, from James Forrestal, The Secretary of the Navy, relative to the claim which the Company had submitted to Congress (R. p. 1556). We quote as follows from that communication:

> "The case of Baetjer v. The United States (143 F. (2d) 391) involved practically the same circumstances as are presented here, except that in the Baetjer case, the lands acquired by the Government were owned in fee, whereas in the present case they were occupied under long-term leases. Baetjer was trustee for Eastern Sugar Associates which owned approximately 30,000 acres of cane lands, roughly two-thirds of which, to-

gether with the company's mills, were located on the island of Puerto Rico. The remaining 10,000 acres, more or less, were situated on Vieques Island, 10 to 17 miles distant. Most of these lands on Vieques Island were condemned by the United States for naval uses. The district court discarded evidence introduced for the purpose of showing that the capital value of the company's holdings on the island of Puerto Rico had depreciated as a result of the takings of its lands on Vieques. The circuit court of appeals (first circuit) held that the evidence was admissible for the purpose of showing that the over-capacity of the mills with respect to cane lands available to supply them had depreciated in value. 'In short,' the court said, 'the stricken evidence would indicate a compensable loss only if it means that after the taking the appellants' mills had an uneconomic over-capacity so that they could not be operated by anyone as efficiently and therefore as profitably as before the taking, this being a matter which a hypothetical willing buyer would consider in determining what he would pay for the property.'

"The Navy Department is not informed of any 'decided case' that has ever held that a different principle than that followed in the Baetjer case should be applied in a situation where the lands taken were occupied under long-term leases under circumstances such as we have here, nor does it understand that the Attorney General of the United States has ever had occasion to sanction such a distinction."

It is submitted to the Court that the above quotation expresses the views of the agency of the Government which initiated the takings in these proceedings. While it is, of course, merely the opinion of the Navy Department, it is worthy of note because it shows that the Navy believes that the principle of the Baetjer case is applicable to the facts of the present case.

There is no doubt but that the remaining properties of the Honolulu Plantation Company were severely damaged

by reason of these takings. It was given a death sentence. It was left with properties that had great value to a going concern but had less value when large portions of the Company's lands were taken. It is not a fictitious loss, it is not a hypothetical loss, nor is it an unascertainable loss. It is a direct and measurable loss and a loss due to the action of the Government. No compensation has been paid to the Appellee or anyone else in connection with the severance damages to Appellee's properties. It is submitted to the Court that the Constitution of the United States protects property owners against such a loss. The Appellee is entitled in this case to recover damages in the amount of that loss.

In its decision, the trial court found that the Company had proven its claim that its remaining properties decreased in value at the rate of $1,000 an acre for each cane acre taken (R. p. 491). Accordingly, the trial court awarded damages upon the basis of $1,000 per acre for 440.175 acres, or a total of $440,175.

III.

THE FINDINGS OF THE TRIAL COURT ARE NOT CLEARLY ERRONEOUS WITHIN THE MEANING OF SECTION 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND SHOULD NOT BE DISTURBED ON APPEAL.

Appellate courts are constituted primarily for the purpose of adjudicating questions of law. Such courts ordinarily will not decide questions of fact on the basis of the printed record because no opportunity is afforded the court to judge the credibility of the witnesses. Accordingly, the question of the credibility of the witnesses and the weight to be given their testimony is exclusively within the province of the trial court, the appellate court being called upon to determine whether there is any evidence from which the trial court may properly draw its conclusions.

It is a well settled rule that the value of real property or damages to real property may be proved by the estimate, conclusion or opinion of competent witnesses. The unusual or speculative character of the property does not preclude testimony by competent witnesses as to value or changes in value.

The relative weight and sufficiency of expert and opinion testimony is peculiarly within the province of the trial court in non-jury cases. Under such circumstances, the court will ordinarily consider the background, character and ability of the witness, his demeanor upon the witness stand, the soundness of his reasoning, possible bias in favor of the party for whom he testifies, the fact that he may be a paid witness and any other factors which may serve to affect his opinions of value. However, the court is not obligated to accept the testimony of an expert witness instead of its own judgment simply because the expert has special knowledge concerning the matters upon which he testifies.

This latter rule is well illustrated in the case of *Burnett v. Central Nebraska Public Power and Irr. Dist.,* 125 F. 2d 836, 837, 1942, in which the court remarked:

> "Testimony as to the market value of land cannot soundly be regarded as anything more than an expression of opinion. Byers v. Federal Land Co., 8 Cir., 3 F. 2d 9, 11. Of this fact, the range of values testified to by the experts in this case, from $40,178.36 to $119,430.76, is a complete demonstration. In such a common field, a jury cannot be required to substitute the opinion of expert witnesses for its own practical judgment on all the evidence even in cases where the estimate of the experts may not have been specifically contradicted. . . . While the jury is not at liberty, of course, arbitrarily to ignore such testimony, any more than it may ignore any other competent evidence, it has the absolute right to appraise it and to determine what weight shall be given to it or any part of it, in the light of all the general facts and circumstances developed on the trial, and of its own common knowledge and or-

dinary experience. . . . If it has been permitted to inspect the property, it is entitled, under the law of Nebraska, to treat such an inspection as part of the evidence of the case, and to make it an appropriate factor in its decision. . . ."

In the case of *Samuelson v. Central Nebraska Public Power & Irr. Dist.,* 125 F. 2d 838, 840, 1942, the court remarked as follows:

> "As we have indicated in the Burnett case, supra, a jury is never required, in an ordinary condemnation proceeding, to accept as conclusive the estimates of value made by expert witnesses on either side. There ordinarily is in such cases some general testimony as to the location, character, use, etc., of the property, and other pertinent facts usually also are developed on direct or cross examination of the witnesses. All of this the jury is entitled to consider, together with any reasonable inferences which may be made therefrom, and it may properly exercise its own deliberate judgment on the amount of the damages, from the evidence as a whole, in the light of its common knowledge and ordinary experience, giving to the estimates of the expert witnesses only such weight as it conscientiously feels they are entitled to receive under all the circumstances. . . ."

Even where several competent witnesses concur in their opinions and no evidence is offered in contradiction, the court in a non-jury trial is bound to decide the issue in its own judgment. *The Conqueror,* 166 U.S. 110, 41 L. ed. 937, 1896.

The attention of the Court is directed to the case of *United States v. 2,049.85 Acres of Land,* 49 F. Supp. 20, 23, 1943, in which the court said:

> ". . . While a jury 'has no right arbitrarily to ignore or discredit the testimony of unimpeached witnesses, so far as they testify to facts, and that a willful disregard of such testimony will be ground for a new trial,

no such obligation attaches to witnesses who testify merely to their opinion; and the jury may deal with it as they please, giving it credence or not as their own experience or general knowledge of the subject may dictate. * * * The jury, even if such testimony be uncontradicted, may exercise their independent judgment.' The Conqueror, 166 U.S. 110, 111, 131-133, 17 S. Ct. 510, 518, 41 L. Ed. 937. See, also, Head v. Hargrave, 105 U.S. 45, 50, 51, 26 L. Ed. 1028.

"The testimony of the witness Spice, a well-qualified geologist of wide experience called in this case as an expert witness by the government, was clear and definite upon the facts relating to the probability of the production of oil in paying quantities from the lands in question and was doubtless given great weight by the jury. The jury had that exclusive right and their findings on such question should not be disturbed."

In the instant case, the trial court found that the Honolulu Plantation Company had suffered damages to its remaining property at the rate of $1,000 per acre for each acre of cane land taken. In its decision (R. p. 490, 491), the trial court remarked as follows:

"Very definitely the witnesses here meant what the First Circuit Court considered in that case a witness might have meant by 'in value of excess equipment.' Here all the evidence and the only evidence, as given by two expert appraisers and two men experienced in plantation affairs, is that the over-capacity of the mill due to the limited acreage available to supply it not only made the Company economically unprofitable but those same facts depreciated the market value of the remaining property, for a buyer being able to do no better than the Company could in this situation would pay less, at the rate of $1,000 an acre for each cane acre taken, for what was left of the plantation's physical property and its permanent improvements.

* * * * * * *

"The ascertainment of the fair market value, or here in the absence of a market for sugar plantations, of

'fair value' in a condemnation proceeding is a very practical matter. While it is true that after these takings what was left was in just as good a condition, generally, as it had been the day before, it does not necessarily follow that it therefore is just as valuable. It is plain common sense that a buyer would pay for property what it is worth to him—buy at a figure at which he could reasonably foresee making a profit upon his investment. Considered in this practical light, I am satisfied by the evidence that the Company has proven its claim that its remaining property decreased in value at the rate of $1,000 an acre for each cane acre taken.

"Because in its representations to Congress the Company made a mistake of law in interpreting its facts, I do not believe that its right to recover upon the strength of the Baetjer case should be barred. It still remains true that by the takings it suffered a capital loss, but as that, in turn, directly affected the value of the remaining property, severance damage occurred and may be recovered here."

In view of the general considerations indicated above, the trial court found that the Honolulu Plantation Company was entitled to severance damages upon the basis of $1,000 per acre for 440.175 acres, or a total of $440,175.00.

The rule is well established that the findings of the trial court in equity will not be reversed unless "clearly erroneous." This rule was written into the Federal Rules of Civil Procedure as Rule 52 (a) applicable to all non-jury trials. Rule 52 (a) provides in part as follows:

"... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. ..."

It has been held that Rule 52 (a) is a rule of appellate procedure applicable to eminent domain cases. *United States v. Lambert,* 146 F. 2d 469, 471, 1944.

In the Lambert case, supra, the court remarked:

> "Coming next to the amount of the awards, we must affirm the findings unless they are 'clearly erroneous.' The Rules of Civil Procedure apply to appeals in condemnation proceedings Rule 81 (a) (7) and Rule 52 (a), so far as it fixes the conclusiveness of findings, is a rule of appellate procedure. Moreover, the valuation of real property is an issue particularly for the trial court, for, when all is said, any conclusion can never be more than speculation. Each piece of land is sui generis; there are no others like it, and without others there can be no true market, as there is for fungibles. Sales of similar parcels will certainly help; we can use them as checks or limits up and down, on the theory that a buyer might accept other parcels as substitutes, but they never are equivalents. Hence we think, quite contrary to the defendant's argument, that a judge is wise, in deciding this issue, to be guided by the impression which the experts make upon him. So far as he is not, he will have to put himself in the position of an expert; and while, to some extent that is something which in the end he cannot escape, it is usually safer, so far as possible, to depend upon the apparent frankness, moderation and sagacity of the witnesses. . . ."

In *Iriarte v. United States,* 157 F. 2d 105, 108, 1946, the court remarked:

> "Next the defendants contend that the District Court's valuation of their lands is 'plainly against the proof and, at least, contrary to the clear weight of the evidence,' and is so manifestly inadequate that we ought to set it aside. In answer to this contention it is only necessary first to point out that the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, are applicable to appeals in condemnation proceedings, Rule 81 (a) (7) and that Rule 52 (a) in so far as it makes findings of fact conclusive is a rule of appellate procedure (United States v. Lambert, 2 Cir., 146 F.

2d 469, 471), so that we cannot set aside an award of compensation in cases of this sort unless it is shown to our satisfaction that the trial court's appraisal of value is 'clearly erroneous' (United States v. Delano Park Homes, Inc., 2 Cir., 146 F. 2d 473, 475), and then to say that no such showing can here be made because the evidence of value in this case is highly conflicting, as we shall have occasion to demonstrate more fully hereafter, and the compensation awarded is well within the range of the testimony of the qualified expert witnesses called by the parties. . . ."

Applying these general principles to the case at bar, it seems apparent that the findings of the trial court were not clearly erroneous, but on the contrary were well justified on the basis of the evidence adduced at the trial.

CONCLUSION

Accordingly, it is submitted to the Court that the decision of the lower court awarding the amount of $440,175 to the Honolulu Plantation Company for its property interest in 440.175 acres of land should be affirmed.

Dated at Honolulu, T. H., this 13 day of April, 1949.

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